92-830

NO. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMONWEALTH OF PENNSYLVANIA

Petitioner,

V.

ERNEST P. DANIELS, III

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fourth Amendment requires the police to inform an individual, whose consent to search is being requested, that he possesses the right to refuse to consent to the search in order for that consent to be deemed voluntary, and whether police persistence in seeking consent after consent has been initially refused constitutes a seizure under the Fourth Amendment?

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OPINIONS BELOW

The August 12, 1992, Order of the Supreme Court of Pennsylvania denying petitioner's petition for allowance of appeal, a copy of which is set forth at Appendix "A", is as yet unreported. The November 8, 1991, Opinion of the Superior Court of Pennsylvania with one dissent, which is set forth at Appendix "B", is published at 599 A.2d 988 (1991). The September 25, 1990, Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, is set forth at Appendix "C", and is an unpublished slip opinion.

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on August 12, 1992, and this petition was filed within ninety (90) days of that date in compliance with Rule 13.1 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent, Ernest P. Daniels, III, was charged by Criminal Information filed July 10, 1989, at No. CC 8906665, in the Court of Common Pleas of Allegheny County, Pennsylvania,

Criminal Division, with one count of possession with intent to deliver a controlled substance (cocaine), 35 P.S. § 780-113(a)(30), and possession of a controlled substance (cocaine), 35 P.S. § 780-113(a)(16).

On September 5, 1989, respondent, through appointed counsel, filed an Omnibus Pretrial Motion which contained, *inter alia*, a motion to suppress evidence obtained during a search of respondent's bag after he deboarded an airplane on the basis that the seizure was unconstitutional. On November 22, 1989, privately retained counsel, David Rothman, Esq., filed a Supplemental Motion to Suppress, alleging, *inter alia*, that the police were not justified in stopping respondent and that the evidence seized was the

fruit of an illegal search and should, therefore, be suppressed as violative of his Fourth Amendment right to be free from unlawful searches and seizures.

A suppression hearing was held before the Honorable Paul F. Lutty, Jr., on February 2, 1990, and the motions were denied on February 22, 1990. On that same date, respondent proceeded to a non-jury trial before Judge Lutty and was adjudged guilty of all charges. After disposition of post-verdict motions, respondent was sentenced to serve a term of five (5) to ten (10) years incarceration and fined $25,000.

Respondent's timely appeal to the Superior Court of Pennsylvania resulted in the Order and Opinion of November 8, 1991, vacating the judgment of sentence and remanding for a new

trial. *Commonwealth v. Daniels*, ___ Pa. Super. ___, 599 A.2d 988 (1991). The Superior Court of Pennsylvania held that once respondent indicated his refusal to the search of his bag, the encounter escalated into an illegal custodial detention when officers suggested that if respondent was embarrassed by the prospect of a public search, he could accompany them to their terminal office, concluding that a reasonable person would not have felt free to disengage from the encounter at that point. The Superior Court then held that respondent's subsequent consent to the search of his bag in the drug interdiction office was the product of the illegal detention and not the result of an independent act of free will. *See* Appendix B.

The Commonwealth sought and was denied by Order of August 12, 1992, review by the Supreme Court of Pennsylvania of the reversal and remand for new trial. This petition followed.

B. Concise Statement of the Facts

The evidence adduced at the suppression hearing and trial established that on March 13, 1989, Officers Dean Kaminski and James Hasara, of the Allegheny County Police Department, were working with the Drug Interdiction Unit at the Greater Pittsburgh International Airport. Officer Kaminski was approached by an airline employee who informed him that he had assisted respondent in purchasing an airline ticket to LaGuardia Airport in New York City. He explained that respondent paid cash for a full fare

round trip ticket departing from Pittsburgh at 12:05 PM and returning to Pittsburgh at 4:34 PM. He described respondent as a black male wearing jeans and carrying a blue nylon bag with red trim.

Acting on this information, Officers Kaminski and Hasara established surveillance and observed respondent among the first group of passengers deplaning from Flight 33. The police approached respondent as he headed for the main doors and identified themselves as police officers; Officer Hasara displayed his badge. The officers asked respondent if he would mind talking to them. He replied, "Sure" and set down his bag.

They asked respondent some general questions concerning his

identity. In response, he told them who he was and showed them a Pennsylvania driver's license bearing his name and address. He explained that he had flown to LaGuardia to loan money to a friend. The police officers also asked to see his airline ticket. Respondent could not produce it, explaining that he had left it on the plane. At that point the officers explained that they were part of the Drug Interdiction Unit, that respondent fit the drug courier profile, and asked if he would consent to the search of his bag. He replied that he did not want the officers to search the bag. Officer Hasara then asked if respondent's reluctance was due to the public location, out in the main corridor with other passengers passing by. He advised respondent that, "If you wish, we

could walk around the corner here about 200 feet into our office. . . . If that was (sic) the problem with your reluctance to the search, we could do it in private." (N.T. 2/2/90, p. 15). Respondent replied that he was embarrassed to be searched in public. At that point, the officers turned to walk towards their office. Neither officer compelled or forced respondent to go to the office. Respondent, nevertheless, picked up his bag and walked with them to their office. (N.T. 2/2/90, pp. 14-15).

Once in the office, Officer Kaminski again asked respondent if he would consent to a search of his bag in this more private setting. Officer Hasara offered respondent a consent to search card for him to read. Respondent then stated that he was not going to sign

anything, but that they could search anything they wanted. He placed the bag on the table and began to open the center compartment. Officer Hasara stopped him and explained that if he was voluntarily consenting to the search, they wanted him to sign the card. After looking at the card for 20 to 25 additional seconds, respondent signed the card. Respondent began to remove clothing from the center compartment of the bag and open two of the three remaining compartments, stopped, and sat back in his chair. Officer Kaminski then opened the last zippered compartment and discovered a double zip lock bag containing approximately 116.3 grams of cocaine. (N.T. 2/2/90, pp. 17-18, 20-22).

REASONS FOR GRANTING THE WRIT

I. THE SUPERIOR COURT OF PENNSYLVANIA HAS MISAPPLIED SETTLED FOURTH AMENDMENT PRINCIPLES IN HOLDING THAT RESPONDENT WAS ILLEGALLY DETAINED AT THE POINT WHEN HE CHOSE TO ACCOMPANY DRUG INTERDICTION POLICE TO THEIR AIRPORT OFFICE; CONSEQUENTLY, THE COURT'S CONCLUSION THAT RESPONDENT'S APPARENT CONSENT TO THE SEARCH WAS INVOLUNTARY IS WITHOUT SUPPORT IN THIS COURT'S JURISPRUDENCE.

The Superior Court reversed the judgment of sentence and remanded the matter for a new trial based upon its determination that the police officers' actions in the corridor of the airport which resulted in respondent's accompanying them to their office constituted an illegal arrest, rendering respondent's subsequent consent to the search of his bag the product of an

illegal detention and not the result of an independent act of free will. *See Commonwealth v. Daniels*, ___ Pa. Super. ___, 599 A.2d 988 (1991). The Superior Court premised this ruling exclusively on the Fourth Amendment and did not advance any independent state grounds.

This Court has specifically recognized that a seizure within the meaning of the Fourth Amendment does not occur simply because a police officer approaches an individual and asks a few questions; "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." *Florida v. Bostick*, ___ U.S. ___, ___, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389, ___ (1991), *quoting California v. Hodari D.*, 499 U.S.

___, ___, 111 S.Ct. 1547, 1551, 113 L.Ed.2d 690, ___ (1991). As this Court explained in *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889, ___, n. 16. (1968), "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." This Court has held that consensual searches are constitutionally permissible if properly conducted, and that the question of whether a consent is voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.

Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854, ___ (1973).

As a corollary to the foregoing principles, this Court has authoritatively held that the question of whether or not a "seizure" implicating the Fourth Amendment has occurred is not affected by the fact that the police did not expressly inform the individual to whom questions are addressed that he is free not to respond.[1] *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762,

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[1] The Court has extrapolated this specific principle from the general holding of *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973), that the voluntariness of a suspect's consent to search is not affected by the failure of the police to tell him that he has a right to refuse.

80 L.Ed.2d 247, 255 (1984)("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."); *U.S. v. Mendenhall*, 446 U.S. 544, 555, 100 S.Ct. 1870, 1878, 64 L.Ed.2d 497, ___ (1980)("Our conclusion that no seizure occurred is not affected by the fact that respondent was not expressly told that she was free to decline to cooperate with the inquiry, for the voluntariness of her responses does not depend on her having been so informed.").

Therefore, in determining whether respondent's act of accompanying the officers to the drug interdiction office was voluntary, the Court should not consider whether the officers advised

respondent that he was free not to accompany them. Rather, the proper focus is "whether, taking all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Bostick, supra,* at ___, 111 S.Ct. at 2387, *quoting Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S.Ct. 1975, 1977, 100 L.Ed.2d 565, ___ (1988).[2]

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[2] In analyzing Supreme Court decisions, LaFave has commented:

> [A]n officer has not made a seizure if, for example, he interrogated "in a conversational manner, "did not order the defendant" to do something or "demand that he" do it did not ask questions which were "overbearing or harassing in nature," and did not "make any threats or draw a weapon." Even physical

(continued...)

2 (...continued)

contacts acceptable if it is "a normal means of attracting a person's attention." On the other hand, an encounter becomes a seizure if the officer engages in conduct which a reasonable man would view as threatening or offensive even if performed by another private citizen. This would include such tactics as pursuing a person who has attempted to terminate the contact by departing, calling to such a person to halt, holding a person's identification papers or other property, blocking the path of the suspect, physically grabbing and moving the suspect, drawing a weapon and encircling the suspect by many officers.

...

"Offensive statements," such as "unsupported outright accusations of criminal activity or suggestions that an innocent person would be willing to relinquish constitutional rights, are not irrelevant" in such an analysis. Indeed it may be

(continued...)

Accordingly, where police merely continue walking along side an individual in an airport concourse, addressing questions to him, without more, no "seizure" occurs. *U.S. v. $73,277, U.S. Currency*, 710 F.2d 283 (7th Cir. 1983); *U.S. v. Edwards*, 898 F.2d 1273 (7th Cir. 1990); *U.S. v. Gray*, 883

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[2](...continued)
true in a more general sense that the subject matter of the conversation which ensues has some bearing upon whether it may be said that the person was subjected to a Fourth Amendment seizure. But this is not to say ... that "Fourth Amendment rights are implicated" whenever "the individual is stopped or detained because the officer suspects he may be personally involved in some criminal activity," but not when "the officer acts for other proper reasons."

3 W. LaFave, Search and Seizure, § 9.2(h) at pp. 412-415 and supp. p. 77 (2d ed. 1987 and 1992 Supplement) footnotes omitted).

F.2d 320 (4th Cir. 1989). A simple request by the police to see an individual's plane ticket or identification documents or to a search of his person or luggage is similarly not a seizure. *U.S. v. Thame*, 846 F.2d 200 (3rd Cir. 1988); *U.S. v. Tavolacci*, 895 F.2d 1423 (D.C. Cir. 1990); *U.S. v. Bell*, 892 F.2d 959 (10th Cir. 1989); *U.S. v. Wilson*, 895 F.2d 168 (4th Cir. 1990). The fact that the police identify themselves as such -- or even more particularly as narcotics investigators -- does not change the equation. *U.S. v. Notorianni*, 729 F.2d 520, 522-3 (7th Cir. 1984) *per* Posner, J., (". . . we cannot think that this made the circumstances coercive. On the contrary, if a federal agent starts asking one questions, and asks to search one's luggage, without

giving any statement of purpose, one is apt to be alarmed -- and will certainly have less forewarning of danger -- than if the agent explains what he is looking for. Joseph K. (in Kafka's novel *The Trial*) was never told the reason why he was being investigated."); *Gray, supra; Tavolacci, supra; U.S. v. Simmons*, 918 F.2d 476 (5th Cir. 1990); *U.S. v. Maragh*, 894 F.2d 415 (D.C. Cir. 1990). *Accord, Commonwealth v. Sanchez*, 403 Mass. 640, 531 N.E.2d 1256 (1988). Thus, "police remain free to seek cooperation from citizens on the street without being called upon to articulate a certain level of justification if a particular encounter proved fruitful, but yet the public is protected from any coercion other than that which is inherent in a

police citizen encounter." LaFave, *supra* at p. 417.

The Commonwealth respectfully submits that the Superior Court erred in concluding that it was reasonable for respondent to believe that he was not free to leave under the facts of the instant case. Specifically, the officers approached respondent and asked if he would mind talking to them; he replied, "Sure" and set down his bag. After determining respondent's identity, they asked about his trip, and he explained that he had flown to LaGuardia to loan money to a friend, and that he had left his airline ticket on the plane. The officers then explained that they were part of the Drug Interdiction Unit, that respondent fit the drug courier profile, and asked if he would consent to the

search of his bag. He replied that he did not want the officers to search the bag. Officer Hasara then asked if respondent's reluctance was due to their public location, out in the main corridor with other passengers passing by. Respondent replied that he was embarrassed. Officer Hasara further suggested to respondent that, "If you wish, we could walk around the corner here about 200 feet into our office. . . If that was (sic) the problem with your reluctance to the search, we could do it in private." (N.T. 2/2/90, p. 15). At that point, the officers turned and began to walk towards their office. Respondent then picked up his bag and walked with them to their office. Neither officer compelled or forced respondent to go to the office. No weapons were displayed,

nor did either officer touch respondent in any way. (N.T. 2/2/90, pp. 14-15). Accordingly, the record does not support the Superior Court's conclusion that a reasonable person would have felt that he was not free to leave.

The Commonwealth further submits that the Superior Court misapplied this Court's decision in *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality). The Superior Court found the instant case to be "remarkably similar" to *Royer*, because respondent "reasonably believed that he was not free to go." However, missing from the court's analysis of *Royer* is the fact that when the officers in *Royer* encountered the suspect and identified themselves and their purpose, they asked for his airline ticket and

driver's license which once surrendered, were never returned. They then asked him to accompany them to their office, which he did, but without response. He was taken to a small windowless room described as a large closet, and without his consent, the officers used his baggage stubs and retrieved his checked luggage and brought it to the room. Then, only after all of this transpired, did they ask if he would consent to a search of his luggage. *Id.* at 494-495, S.Ct. at 1322. It was on these facts that this Court held that, "What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room." *Royer* at 503, 103 S.Ct. 1327.

In its opinion in the instant case, the Superior Court relies on *Royer*

to find that respondent did not voluntarily accompany the officers to the drug interdiction office. However, at the point when the officers made their request, they were not in possession of respondent's identification or luggage. They were in the main concourse of the Terminal building, not in a confined area separate from the public. In this regard, the Superior Court has misapprehended the rule in *Royer* and erroneously concluded that respondent did not voluntarily accompany the Officers to their office.

Similarly, there is no basis in law for the Superior Court's implicit conclusion that once respondent stated that he did not want the officers to search his bag, they could not continue their contact with him, absent obtaining

new information. Although police officers must discontinue interrogation, and not re-initiate further contact, after an arrestee invokes his Fifth Amendment right to counsel, see *Minnick v. Mississippi*, 498 U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); no such prohibition exists under the Fourth Amendment. Rather, the proper inquiry is whether the police conduct would have caused a reasonable person to believe that he was not free to leave. *See Chesternut, supra*, 486 U.S. at ___, 108 S.Ct. at 1979, 100 L.Ed.2d at ___; and *Delgado, supra*, 466 U.S. at 216-217, 104 S.Ct. at 1762-1763, 80 L.Ed.2d at 255. As LaFave has commented, under the voluntary test, "there is no absolute bar

upon continuing to seek consent in the face of the prior refusal." 3 W. LaFave, *Search and Seizure, supra,* § 8.2(f) at pp. 200-201. *See State v. Cody*, 293 N.W.2d 440 (S.D. 1980) (although defendant initially refused to sign consent to search form without consulting a lawyer, his subsequent signing of the consent form at the request of the police was held voluntary under the totality of the circumstances); and *cf. State v. Childress*, 4 Ohio St.3d 217, 448 N.E.2d 155 (1983)(distinguishing *Edwards* and holding that police officers may continue to seek a waiver of the accused's Fourth Amendment rights even after he has invoked his right to counsel).

The Superior Court's decision in the instant case represents a gross departure from established precedent

concerning fundamental principles inherent in the Fourth Amendment, and it is in conflict with decisions of the Courts of Ohio and South Dakota, and therefore, warrants review by this Court. Because of the conflict of the Superior Court's decision with this Court's past decisions, and the importance of the issue to national drug interdiction efforts, the Court may wish to consider summary reversal.

CONCLUSION

In view of the conflict of the decision below with past decisions of the Court, as well as the Courts of Ohio and South Dakota, and the importance of the issue to national drug interdiction efforts, the Commonwealth respectfully requests that this Court grant the instant petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

DISPOSTITION BY PENNSYLVANIA SUPREME COURT

On August 12, 1992, the Supreme Court of Pennsylvania entered the following Order on the Commonwealth's petition for allowance of appeal in the case of Commonwealth of Pennsylvania v. Ernest P. Daniels, III, at No. 0079 W.D. Allocatur Docket 1992:

"August 12, 1992
Petition Denied
Per Curiam"

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

ERNEST P. DANIELS, III,
Appellant

No. 950 PITTSBURGH, 1990

ORDER

AND NOW, this 8th day of November 1991, it is ordered as follows:

X Judgment of Sentence vacated and case is reversed and remanded. Jurisdiction is relinquished.

BY THE COURT

/s/Eleanor R. Valecko
Deputy Prothonotary

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

ERNEST P. DANIELS, III
Appellant

No. 950 Pittsburgh, 1990

Appeal from the Judgment of Sentence of the Court of Common Pleas, Allegheny County, Criminal Division, at No. 8906665.

BEFORE: McEWEN, DEL SOLE AND FORD ELLIOTT, JJ.

OPINION BY DEL SOLE, J.:
FILED: NOVEMBER 8, 1991

Appellant, Ernest P. Daniels, III, has taken this appeal from the judgment of sentence to a term of

imprisonment of from five years to ten years imposed after he was found guilty, following a non-jury trial, of violation of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §§780-102 *et. seq.*, specifically, possession of cocaine with the intent to deliver. The trial court denied the post-verdict motions of Appellant and this appeal followed.

On appeal, Mr. Daniels raises one issue for review, whether the trial court erred in failing to suppress the cocaine found in his possession after his hand luggage was searched by Allegheny County Police Officers in Greater Pittsburgh International Airport Terminal.

A suppression hearing was held prior to trial, and the trial court denied the motion to suppress, on the

grounds that,: (1) that the officers did not conduct a "Terry" stop, but their questioning of Appellant was merely a citizen encounter, and (2) Appellant's consent to the search of his carry-on bag was freely and voluntarily given.

The record reveals that Appellant was approached by two police officers in the main concourse of the airline terminal. The officers had received information from an airline employee that Mr. Daniels had purchased a round-trip ticket to New York's LaGuardia Airport with cash, and that he had made reservations on flights which indicated that Appellant would be in New York for approximately four hours. The officers were using a drug courier profile based on such factors as cash paid tickets of short duration to a known

narcotics distribution center such as New York, and casual dress rather than business attire, as grounds for monitoring the movements of Appellant in the terminal.

After Appellant deplaned, he walked at a brisk pace looking from side to side. As he approached the exit he was stopped by the officers who identified themselves and asked to see some identification. At this point the officers ascertained that Appellant was not traveling under an alias, and that his identification was all in order. Following this encounter, the trial court found that Appellant gave consent to a search of his hand luggage. We, however, hold that this finding of voluntary consent to search is not supported by the evidence.

It is clear from the record that when first asked, Appellant refused to consent to a search. Then after this refusal, the officers asked if he was embarrassed to be searched in public, and he agreed he was. He was then escorted to the interdiction office. (N.T. February 2, 1990, at 15, 35). The officers' conduct indicated that the only choice Appellant had was either to be searched in public or searched in private to avoid public embarrassment. Therefore, we cannot justify a finding that Appellant voluntarily consented to a search in the drug interdiction office.

Because we conclude that Appellant did not voluntarily consent to accompany the police officers into the drug interdiction office, we hold that Appellant was illegally detained in the

interdiction office at the time he signed a consent-to-search form allowing the officers to open and search his shoulder bag. Consequently, the cocaine found in the Appellant's shoulder bag was inadmissible even though he consented to the search once he was in the interdiction room, because it was the product of an illegal detention, and not the result of an independent act of free will. *See*, Florida v. Royer, 460 U.S. 491, 501, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983), *citing*, Dunaway v. New York, 442 U.S. 200, 218-219, 99 S.Ct. 2248, 2260-2261, 60 L.Ed.2d 824 (1979).

The facts in Royer, supra., are in several ways remarkably similar to those of our case. In Royer the Appellant was questioned by detectives in an airline concourse because he fit the

drug courier profile.[1] Upon request, but

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[1] The drug courier profile is not a "national profile". Profiles vary from city to city, airport to airport, and also depending on which law enforcement agency is using them. The profile is subject to racial abuse and gender stereotyping, where the fact that a person is an African-American, Columbian, or Hispanic has appeared as a profile characteristic, as has the fact that the person was the only woman on an airplane carrying business travelers. Commonwealth v. Lidge, ___ Pa.Super. ___, 582 A.2d 383 (1990). A breakdown of profile traits listed in the reported decisions reveals that it encompasses such contradictory characteristics as deplaning first and deplaning last, paying with small bills and paying with large bills. It also encompasses an extraordinary amount of innocent behavior such that the average airline traveler would be hard-pressed to not display at some time during a trip. Furthermore, it is not clear whether the display of one or two characteristics is sufficient

(continued...)

without oral consent, Appellant produced his airline ticket and driver's license, which carried his correct name. He was asked to accompany the detectives to a small room for questioning, but his license and ticket were retained by the police, and his baggage was retrieved from checked luggage. While in this small room he consented to the search of his luggage. The Supreme Court held:

> What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a

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(1 cont.)

> to fit the profile, or whether if some characteristics carry greater weight than other characteristics such that the display of one of these weightier characteristics may trigger an airport stop. Note, The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures? 12 Nova. L. Rev. 273, 288-296.

> police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions . . . [H]e reasonably believed that he was being detained. At least as of that moment, any consensual aspects of the encounter had evaporated, and we cannot fault the Florida District Court of Appeal; for concluding that Terry v. Ohio and the cases following it did not justify the restraint to which Royer was then subjected. Royer, supra., 460 U.S. at 503, 103 S.Ct. at 1327.

In the instant case, like Royer, Appellant allegedly fit the drug courier profile. However, he was not travelling under an assumed name. In fact when this was ascertained by the officers their suspicions became less reasonable, because they were less particularized. Also, as in Royer, Appellant "reasonably believed" that he was not free to go.

In United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), the Supreme Court held, "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

In the present factual situation, in view of all the surrounding circumstances, we hold that it was reasonable for Mr. Daniels' to believe he was not free to leave, and therefore the search constituted a violation of his Fourth Amendment rights. Appellant never consented to accompany the officers to the interdiction office, and therefore the consent to search given by Appellant,

while he was in the office, was the product of an illegal detention, and was therefore invalid. Consequently, the fruits of this primary illegality, the illegal detention, should have been suppressed. Dunaway, supra.

Furthermore, we hold that the illegal search and seizure was not justified on traditional "Terry stop" reasoning, because, (1) the police did not have "reasonable suspicion" that Appellant was engaged in criminal activity, and (2) even if there were reasonable suspicion, this did not justify a non-consensual search of Appellant's luggage.

The Supreme Court, in United States v. Sokolow, ___ U.S. ___, 109 S.Ct. 1581, 1585 (1989), has recently held that in evaluating the

reasonableness of a stop, the courts must look to, "the totality of the circumstances -- the whole picture." In Sokolow, respondent purchased two round-trip tickets from Honolulu to Miami, and paid $2,100 from a large roll of $20 bills. The ticket agent noted that Mr. Sokolow appeared nervous, and that he was wearing a black jumpsuit with gold jewelry. Respondent gave his name as Andrew Kray and neither he nor his travelling companion checked any baggage.

After Mr. Sokolow returned to Honolulu, he was seized by DEA agents and escorted to the DEA office in the airport. A narcotics detector dog sniffed Mr. Sokolow's luggage and alerted to the respondent's should bag in the office. Appellant was advised of his rights, and the agents obtained a warrant

to search the shoulder bag. They found no illicit drugs, but the bag did contain several suspicious documents indicating respondent's involvement in drug trafficking. The agents had the dog reexamine the remaining luggage, and this time the dog alerted to a mediumsized bag. It was too late to get a warrant to search this bag, but respondent returned home and the agents retained the bag. The next morning a warrant was issued and the bag was opened revealing over 1,000 grams of cocaine.

The Sokolow court determined that the information from the respondent's activities which conformed to the drug courier profile and such other activities, such as appearing nervous and looking around the waiting room during a stopover in Los Angeles, constituted, "in

the totality of the circumstances" reasonable suspicion. Although, it reversed the court of Appeals, stating that both "probabilistic evidence", such as evidence available from a drug courier profile, and evidence of "ongoing criminal behavior", have equal evidentiary significance, nonetheless, each case must be evaluated on a case by case basis as, "the concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules." Id., 109 S.Ct. at 1585.

In the case before us, the officers had evidence which showed that Appellant fit the drug courier profile to the extent that he paid in cash and was travelling for a short duration to a source city. However, it was ascertained that he was not travelling under an

assumed name as soon as the officers approached Appellant. Evidence that Appellant looked from side to side, is certainly not indicative of anything, nor is it even suggested that this behavior conforms to the drug courier profile. In fact, we do not know what the profile consists of, or to what degree the profile accurately identifies persons carrying drugs. Rather, all we do know is that when the officers determined that Appellant was not travelling under an assumed name, their suspicions should have been allayed. Therefore, in the totality of the circumstances, we hold that the officers did not have reasonable suspicion to detain Appellant.

However, assuming *arguendo*, that there was reasonable suspicion to justify a Terry stop, the non-consensual search

of Appellant's hand luggage was certainly not justified under Sokolow. In Sokolow, the Court held that since the seizure or Terry stop in question was justified by reasonable suspicion, the DEA agents could employ a narcotics detection dog to immediately conduct a canine sniff test. See, United States v. Place, 462 U.S. 705, 103 S.Ct. 2637, 2644-2645, 77 L.Ed.2d 110, (exposure of luggage to a trained canine did not constitute a search within the meaning of the Fourth Amendment). It was only after the dog alerted to a particular piece of luggage, that there was probable cause to obtain a warrant.

Here, there was no canine sniff prior to the search of Appellant's luggage, and no probable cause to obtain a warrant in order to open and examine

the contents of the bag. As we have stated above, since there was no valid consent given for the search of Appellant's hand luggage, such search can not be justified by the Court's holding in Sokolow, even assuming there was reasonable suspicion to stop Appellant.

Therefore, we hold that the seizure of Appellant and the search of his luggage was effected in derogation of his Fourth Amendment rights, and the cocaine seized should have been suppressed.

Judgment of sentence is vacated and this case is reversed and remanded. Jurisdiction is relinquished.

McEwen, J. dissents.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

ERNEST P. DANIELS, III

NO. CC 8906665

OPINION

Paul F. Lutty, Jr., Judge

September 25, 1990

Background

Defendant, Ernest P. Daniels, III, deplaned from USAir flight 33 from New York City, at the Greater Pittsburgh International Airport terminal and was approached by Allegheny County police

officers Dean Kaminski and James Hasara. The officers were monitoring the terminal for possible narcotics distribution activity. Acting on information from an airline employee, they established surveillance and observed the Defendant among the first group of deplaning passengers from flight 33. Because the Defendant matched the description given to the officer by the airline employee and the carry-on bag in his possession also matched the description given by the airline employee, the officers maintained surveillance of the Defendant as he made his way down the corridor. As the Defendant headed toward the doors, the officers approached him and identified themselves as police officers. The officers asked the Defendant if they could see his airline ticket, but he

stated that he left it on the aircraft. At that point, the officers asked for the Defendant's consent to make a brief search of his carry-on bag. The Defendant agreed to the search of his carry-on bag if it was done in the privacy of the drug interdiction office at Gate 44 and not in the corridor in public view. Additionally, after several requests, the Defendant signed a Consent to Search card. Pursuant to the search, the officers discovered a parcel containing a suspected controlled substance. The Defendant was then advised of his Miranda rights and proceeded to sign a standard Allegheny County police rights waiver form. The suspected controlled substance was field tested and found to be positive for the presence of cocaine.

A suppression hearing was held on February 2, 1990, before this Honorable Court. Defendant's motion to suppress the cocaine as the result of an illegal search was denied. The Defendant proceed to a bench trial before this Honorable Court and was found guilty on count one of the information, that of possession with the intent to deliver a controlled substance and at count two, guilty of possession of a controlled substance.

Defendant filed a motion for a new trial and/or an arrest of judgment. Defendant's post-trial motions were denied, and on June 7, 1990, the Defendant was sentenced to a term of imprisonment of 5 to 10 years and a fine of $25,000.00. This appeal follows.

In its Concise Statement of Matters Complained of on Appeal Pursuant

to Pa. R.A.P. 1925(b), the Defendant raises the following issues:

> a. The suppression court erred in failing to suppress the fruits of an illegal search of the Defendant and trial counsel was ineffective for failing to move to suppress on this basis;
>
> b. The trial court abused its discretion in sentencing the Defendant outside of the guidelines set forth in 18 Pa. C.S.A. Section 7508; and trial counsel was ineffective for failing to object at the sentencing or in a motion to reconsider sentence.

Analysis

Addressing the issues in reverse order, this Court is constrained to summarily dispose of the Defendant's second contention due to the commanding language of 18 Pa. C.S.A. Section 7508(c), providing in pertinent part:

> c. **Mandatory** sentencing. **There shall be no authority in**

> any court to impose on an offender to which this section is applicable a lesser sentence than provided for herein, or to place the offender on probation, parole, work release or pre-release, or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than provided herein. The sentencing guidelines promulgated by the Pennsylvania Commission of Sentencing shall not supersede the mandatory sentences provided herein.

This Court was well within its discretion in imposing the sentence that it did. It is for that reason that the Court deems that any objection that would have been made by trial counsel to the sentencing court would have been meritless. Additionally, the Court points out that trial counsel did file a Motion to Modify Sentence pursuant to Rule 1410 and that motion was denied.

The Defendant's first contention raises the question of whether an activity occurred on March 13, 1989, at the Greater Pittsburgh International Airport constituted a legal search and seizure. The record indicates that officers Kaminski and Hasara were on duty, specifically monitoring the terminal for possible narcotics distribution activity. Acting on information from an airline employee and pursuant to a drug courier profile, the officers established surveillance and monitored USAir flight 33 from New York City, specifically the Defendant. Defendant exited the plane dressed in stark contrast to the remaining business suit-clad passengers, wearing casual clothing, and having in his possession a carry-on bag. The officer monitored the

Defendant's behavior noticing his brisk, nervous walk down the corridor also noticing the fact that he retrieved no luggage from the baggage claim department. The Defendant's behavior and activities in the terminal consistent with the information received from the airline employee and with an articulable profile for drug couriers, prompted the officer to approach the Defendant as he was heading toward the doors.

The officers identified themselves as such and asked the Defendant if they could speak with him. Defendant answered affirmatively. His airline ticket was not produced as he stated he left it on the aircraft, but the Defendant did produce a picture drivers license. The officers then requested to make a brief search of the

Defendant's carry-on bag. The Defendant indicated to the officers that they could search the bag, but requested that it be done in a more private location. With that in mind, the officers proceeded to the airport drug interdiction office, and the Defendant voluntarily followed. Once inside, the Defendant began removing the contents of the bag and showing them to the officers. The Defendant also signed a consent to search card. After unzipping two of the side compartments, the Defendant stopped and did not open another zipper compartment that remained closed. Pursuant to the officers search of the remaining compartment, they discovered a parcel containing a suspected controlled substance. Defendant was then advised of his Miranda rights. The suspected controlled

substance was field tested and found to be positive for the presence of cocaine.

It appears to this Court that the question presented is whether consent was freely and voluntarily given to the officers to search the carry-on bag containing the cocaine. The Supreme Court in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20, LED.2d. 889 (1968), held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause. Instantly, however, there was no evidence adduced at the suppression hearing, or the trial, to indicate that the activities that occurred constituted a "stop" of any type. The officer

approached the Defendant in a common area of the airport. There was no show of force, no block routes of egress, nothing that would indicate that the Defendant was not free to leave the presence of the officers at any time. Further, the Supreme Court has decided that a "seizure" occurs when:

> ... within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave would be the threatening presence of several officers, display of a weapon by an officer, some physical touching of person or the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *See* Terry v. Ohio, 392 U.S. at 1879, N. 16; Dunaway v.New York, 442 U.S. 200, 207, and N. 6, 99

S.Ct. 2248, 2253; 3 W. LaFave, Search and Seizure, 53-55 (1978).

"In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *See* United States v. Mendenhall, 446 U.S. 544, 554-555, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

According to the Mendenhall case, supra., the foregoing activity surrounding the Defendant constitutes a citizen encounter. The search of Defendant's carry-on bag, which produced the cocaine, was then not pursuant to an illegal seizure, and as such not violative of the Defendant's Fourth Amendment rights. A question arises as to whether the Defendant's consent to have his carry-on bag search was freely and voluntarily given. The issue in reality does not arise because of two

reasons. First, the determination that the encounter was a citizen encounter rather than an investigative stop pursuant to Terry. Second, because the Defendant voluntarily signed a consent to search card.

This Court points out that all relevant issues concerning the procedures at the Greater Pittsburgh International Airport were considered at the suppression hearing, and that any other efforts by trial counsel to suppress the evidence obtained pursuant to the airport search would have been found meritless.

Conclusion

It is the opinion of this Honorable Court that the denial of the Motion to Suppress was correctly rendered by the Suppression Court and that the

sentence imposed on the Defendant was within the discretion of the Sentencing Court and that the judgment of sentence rendered by this Honorable Court should be affirmed.

BY THE COURT:

/s/ Lutty

J.